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No. 94

In the Supreme Court of the United States

OCTOBER TERM, 1961

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

FLORIDA CITRUS CANNERS COOPERATIVE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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OPINIONS BELOW

The opinion of the court of appeals (III R. 78–93)[1] is reported at 288 F. 2d 630. The findings of fact, conclusions of law, and order of the Board (I R. 174–189, 66–144) are reported at 124 NLRB 1182.

JURISDICTION

The judgment of the court of appeals was entered on March 27, 1961 (III R. 94). The petition for a writ of certiorari was filed on May 17, 1961, and was granted on October 9, 1961 (III R. 96, 368 U.S. 812).

[1] The three volumes of the printed record will be separately referred to as "I, II, or III R."

The jurisdiction of this Court rests on 28 U.S.C. 1254 (1) and Section 10(e) of the National Labor Relations Act, as amended.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are set forth in the Appendix, *infra*, pp. 33–35.

QUESTION PRESENTED

Whether the court of appeals "grossly misapplied" the standard of review laid down in *Universal Camera Corporation* v. *National Labor Relations Board*, 340 U.S. 474, 491, 496, in setting aside findings of the Trial Examiner and the Board concerning the credibility of the witnesses.[2]

STATEMENT

A. THE BOARD'S FINDINGS OF FACT AND THE SUPPORTING EVIDENCE

The Board found that respondent, a processor of citrus fruit in Florida, violated Section 8(a)(5) of the Act by refusing to bargain with the duly certified representative of its employees, Section 8(a)(3) by replacing and discharging 274 employees who struck in protest against the refusal to bargain and by evicting some strikers from company-owned houses, and Section 8(a)(1) by interrogating employees and seeking, through threats and promises of benefits, to in-

[2] A related question is presented in *National Labor Relations Board* v. *Walton Manufacturing Company*, No. 77, this Term.

duce them to abandon the Union. The facts supporting these findings may be summarized as follows:

1. *The negotiations up to December, 1957.*—In January 1957, the International Brotherhood of Teamsters, Local No. 173, hereinafter called the Union, won a Board-conducted election and was certified as the bargaining representative for respondent's employees (I R. 69). Negotiations opened in April and were carried on sporadically for several months (I R. 72–74; II R. 170–171). In September, the Union's chief negotiator, John Roberts, terminated his employment with the Union in order to join the management of another citrus fruit processing company in the area (I R. 72; II R. 170–171). Thereafter, David F. Wingate became the leader of the Union's bargaining team, and continued the negotiations (I R. 74; II R. 171). In general, the discussion centered upon contract proposals of each of the parties, and, in addition, upon the last contract which respondent had executed with an AFL local which had previously represented the employees (I R. 74–79).

On December 4, Wingate and Company Production Manager, M. A. Stephenson, had a private "off the record" and "man to man" meeting in order to set forth their respective positions (I R. 79–80). The meeting lasted about an hour and a quarter and closed with an agreement that a negotiating session should be arranged to discuss a new compromise proposal which Wingate had presented (I R. 80–83). Stephenson promised to arrange an acceptable date with the Company's counsel and to notify Wingate

when the Company would meet (I R. 83; II R. 209–210, 508–511).

Wingate called Stephenson twice in the next seven days to suggest a meeting and was informed that the Company was not yet ready (I R. 83; II R. 210, 511). On December 11, Wingate wired Stephenson proposing a meeting for the next morning; Stephenson proposed a December 18 meeting instead, and Wingate later confirmed it (I R. 83–84; II R. 542–544).

On December 12 and 13, the Florida citrus belt suffered a severe freeze (I R. 85). It was rumored that many citrus processing companies in the area had ceased contract negotiations until the economic effects of the freeze could be properly assessed (I R. 85–86; II R. 437–438).

2. *The meeting of December 18 and ensuing events.*—At the outset of the December 18 meeting, Wingate, anticipating that the Company would request an additional delay, asked for the Company's position on the Union's most recent proposal (I R. 86; II R. 213, 312–313). Company representatives refused to discuss the proposal, stating that they wished to talk about the freeze (I R. 86; II R. 213–214). Wingate insisted that the Union's proposal be discussed first, whereupon Company counsel Bowden said that there was no point in doing so since the proposal was so different from anything discussed or agreed upon in the past. Wingate asked Stephenson, who had been amenable to the proposal at the December 4 meeting, whether his view was the same as Bowden's. Stephenson replied in the affirmative

(I R. 86–87; II R. 214–215, 272–274, 313–314). Wingate then reviewed the course of negotiations and accused the Company of stalling. He concluded with the statement that strike authorization had been voted and that the Company had until 4:00 that afternoon to reach agreement on a contract or give reasonable assurances that one could be reached (I R. 87; II R. 215–216, 273, 279–280). Company representatives terminated the meeting, asserting that the Company would not respond to the pressure of threats and that it would be a good thing "to let the people strike and get it out of their system" (I R. 87–88, 114; II R. 216–217, 419). At no time did the Company representatives request suspension of the negotiations because of the freeze (I R. 87, 113–114; II R. 443).

Although the Union obtained neither a contract nor reasonable assurance of one within the time limit set, it did not resort to strike action until one month later (see *infra*, p. 9).

In the meantime, on Christmas Day, Stephenson, who had come down to the plant to do some work, met employee J. E. Holly, who was acting as plant watchman. Holly had worked for respondent some thirteen years, had served as chief shop steward for the displaced AFL local since 1948, and had also acted as its representative in certain arbitration matters. Although a member of the Teamsters, he held no official position (I R. 90; II R. 23–24).

According to Holly, Stephenson asked him what he "felt was coming of the Union," and Holly replied that there were strike rumors and that he was dis-

gusted. Holly further testified that Stephenson told him that a strike would be foolish; that it would lead to a plant shutdown; or, if it did not, that a lot of good men might, in any case, lose their jobs (I R. 90; II R. 25). According to Holly, Stephenson suggested that they would all get along better if the men "kicked out" the Union (I R. 90; II R. 25), that the Company might have to meet with the Union a time or two more, but that, after February 6, when the Union could be decertified, there would be no further negotiations because the Company did not intend to sign a contract with "a bunch of gangsters and crooks" (I R. 92; II R. 26).

Holly further testified that Stephenson asked why Holly did not form a group of employees to express to the Company their dissatisfaction with the Union and to begin decertification proceedings. According to Holly, Stephenson said that the Company would make legal counsel available for this purpose "off the record" and that the Company would assist the employees in setting up an independent union (I R. 91; II R. 25). Finally, Holly testified that Stephenson promised that certain pay raises, which the Company would post on the bulletin board in the next few weeks, would give the employees an incentive to get rid of the Union, and that, if the Union were no longer the employee representative, increased hospitalization benefits might be made available free of charge (I R. 90–91; II R. 25–26).

Stephenson's version of his conversation with Holly was vastly different, for, among other things, Stephen-

son denied proposing that Holly initiate decertification proceedings and denied telling Holly that no contract would be concluded with the Union (I R. 93–94; II R. 475–478). The Trial Examiner believed Holly, who was "an impressive witness both on direct and cross-examination," and did not believe Stephenson, who "reflected on cross-examination a demeanor and manner of reluctance in testifying which prevented acceptance of his testimony at face value" (I R. 95).[3] The Board adopted this finding on credibility (I R. 174–175).

On January 4, the Company submitted to the Union, and at the same time posted on the bulletin board, a detailed offer of a wage increase which averaged 5½ cents an hour (I R. 95–97). Upon receiving the offer, Union Representative Wingate called Stephenson to ask why no contract proposal had been submitted with it (I R. 97; II R. 217–218). Stephenson replied, according to Wingate's testimony, that the offer had been made in this way intentionally and that the Company had no accompanying contract proposal to make (I R. 97, 99; II R. 218). According to Stephenson's testimony, however, he replied that he intentionally withheld a contract, first, because the contract was

[3] The Examiner also gave these additional reasons for believing Holly (I R. 94–95): (1) Stephenson admitted holding the conversation and that it covered the subjects of a company union and the Company's contemplated wage offer; (2) Holly's long time employment and connection with the former union, coupled with his criticism of the Teamsters and his lack of a position with them, "marked him as promising material to lead a defection movement"; (3) Stephenson's promises and predictions, as testified to by Holly, were later fulfilled.

"another phase" of the negotiations and, second, because the Union knew the "full proposals" which the Company had already made (I R. 97; II R. 469). The Trial Examiner believed the Wingate version of the conversation. He noted that, not only did Stephenson admit that the failure was intentional, but that there was no full proposal agreeable to or presented by the Company on the table at that time, or, indeed, at any time since September 19, when, at its own suggestion, the Company had laid aside its original proposal and negotiated on the basis of the old AFL contract and various new Union proposals (I R. 97–98; II R. 469). In addition, the Trial Examiner pointed out in his discussion of the relative credibility of the witnesses that the "withholding of a contract proposal obviously fitted into [respondent's] plan to foment employee dissatisfaction, for Teamsters would thereby be prevented from claiming credit for having accomplished anything in the negotiations" (I R. 99). The Board adopted this resolution of the conflict (I R. 174–175).

On January 10, Wingate wrote to Stephenson and reported that on the preceding day the Union membership had unanimously voted to reject the pay raise unaccompanied by a contract. The letter stated that, "in a sincere effort" to bring the negotiations to a successful conclusion, a "last and final" contract proposal was being included, and requested a prompt answer as to its acceptability (I R. 99–100; II R. 222, 358–359, 362–363, 366–370, 547–548).

Ignoring Wingate's request for an answer, the Company, on approximately January 16, posted a letter

addressed "To Our Employees" (I R. 100–102; II R. 220–221) stating that, since the Union had refused to agree to the wage increases, the increases would not go into effect as promised. The Company further stated that Union membership was not a prerequisite for voting on acceptance of the increase, and expressed the hope that each employee would take advantage of his right to express an opinion and vote on this matter. The Company then gave some information on the effect of the freeze and its relationship to the Company's business, and closed the letter with an offer of assistance "in providing information or answering questions concerning the general situation"; it urged the employees to "feel free to contact" Production Manager Stephenson either directly or through their foremen (II R. 549–550).

The following day, having received no reply to Wingate's letter of January 10, the Union called a strike. It also continued efforts at further negotiations, starting with a telegram on January 18 in which Wingate advised Stephenson that the Union was ready to meet "at any time day or night" to settle the dispute (I R. 103; II R. 223–225, 551). After several wires, the Company finally set January 28 as the earliest time when it could be available for negotiations (I R. 103; II R. 552–556).

3. *The January 28 meeting, and respondent's contemporaneous anti-union activities.*—The meeting of January 28 began with an article by article review of the various pending proposals; some agreements were reached (I R. 103–104). An acrimonious exchange

between Union Negotiator Morgan and Company Counsel Bowden also occurred (I R. 105; II R. 322–341, 355–356). The Company broke off the meeting saying that there were operational problems at the plant which required attention. The Union urged a meeting that night, pointing to the progress which had been made in the negotiations that day. The Company, however, rejected this suggestion on the ground that Stephenson was needed at the plant and that the negotiations could not continue without him. The Union then requested a meeting the next day, but Bowden indicated that he had other plans. Finally, the Union asked whether it would be possible to set up a meeting at any future time. Bowden replied that it was not, and that the Union would have to wait until the Company specified a future date. The Union received no further word from the Company. (I R. 105; II R. 226, 342.)

Meanwhile, both before and after the strike, various Company officials were approaching employees in an effort to undermine their support of the Union. Before the strike, Superintendent Backus had advised employee Widner that if the Union were voted out, as had occurred at another local plant, the Company would give the employees a raise and everything would be all right (I R. 122; II R. 47–48). Foreman Hall suggested to employee Norris that those men who went on strike would probably lose their jobs, that the employees would probably get better pay if they did not strike, and that, in any event, without a Union there would be better pay (I R. 123; II R. 44–46). Fore-

man Milner queried a group of employees, including Gray and Batson, whether they intended to strike, cautioning Gray that if he did, he would be "hard timed" and might be fired (I R. 123; II R. 93–95, 159–160).

After the strike began, various employees were solicited by their foremen to return to work, while others received warnings that, if they did not return to work the next day, they would lose their jobs (I R. 116, 118; II R. 50–51, 90–92, 109–110, 111–1113, 162–163). Foreman Kelley told striker Brimlow that, if he returned to work, Kelley would provide him with other work when Brimlow's job was automated (I R. 118–119; II R. 152–153). Foreman Nolin told employee Jackson that he had the names of the strikers listed on a paper in Foreman Cannon's office and that he would hate to put Jackson's name on this list because "those boys would not be back" (I R. 121; II R. 97). When Foreman Rexford saw veteran employee Tadlock on the picket line, he expressed surprise and urged Tadlock to return to work (I R. 116–117; II R. 105). Rexford later visited Tadlock's house and, in Tadlock's absence, talked to his wife some 25 to 30 minutes, urging her to persuade her husband to return to work. Among other remarks, Rexford told Mrs. Tadlock that he wished to take care of her husband by seeing that he worked until retirement age and that the Company had "fixed it" before the strike so that the strikers could not win (I R. 117; II R. 106–107). Rexford reiterated the idea that the Company had "it fixed" in a similar conversation with striker Shuman (I R. 117; II R. 127).

Company management also encouraged the employees to seek decertification of the Union. Although prevailing Company policy and practice had not permitted solicitation of union membership during working hours (I R. 106–107; II R. 77, 386, 471–472), between January 22 and February 7, various employees were permitted, during working hours and on Company time, to circulate petitions which stated that the signing employees were withdrawing their authorization from the Union and that they wished to accept the proposed wage increases (I R. 105–106, 108–112; II R. 18, 66–69, 381, 403–404). The petitions were circulated as often as three times in some of the departments (I R. 111; II R. 144–146, 149). Indeed, on one occasion, Foreman Durrance complained to Superintendent Chelette that employee Connelly was spending too much time away from her job circulating one of the petitions. Chelette replied that Connelly had his permission to solicit for the signatures (I R. 110; II R. 75), and Connelly told Durrance that "they wanted her to stay over" that night and circulate a petition on the evening shift, too, in order to get it ready to be sent to the Labor Board by February 6 (II R. 76).[4] Durrance warned Foreman Jones, who was on the next shift, of the "jam" he had gotten into in the morning because of the petitions, but Jones replied that Superintendent Chelette had already called him in and told him "they would be around" with one of the petitions that night (I R. 110; II R. 77). At the end

[4] The end of the Union's certification year fell on February 6 (I R. 79).

of the drive, there were eight petitions bearing the signatures of 593 employees, or 76.2% of the total working force (I R. 111; II R. 473–474).

On February 17, the Company notified the Union that, because of the petitions it had received from the employees, it was withdrawing its recognition of the Union. Although Wingate requested a further meeting, the Company adhered to its policy of nonrecognition (I R. 112; II R. 558–559, 560, 561). On February 20, the Company announced that it was putting into effect the pay raise rejected by the Union, retroactive to December 16; on March 13, it announced an improved hospitalization plan (I R. 112–113; II R. 533–534, 535–537).

Meanwhile, the Company had replaced 274 of its striking employees, having notified each by letter that he was discharged (I R. 125; II R. 530–533, 562–566). The Company also served eviction notices on ten strikers who were tenants in Company-owned homes (I R. 126–127; II R. 166–167, 479–481).

B. THE BOARD'S CONCLUSIONS AND ORDER

Upon the foregoing evidence, including the testimony of Holly and Wingate which the Trial Examiner accepted as true, the Board found that, on and after December 18, 1956, the respondent had not bargained in good faith with the Union, and had thereby violated Section 8(a)(5) of the Act (I R. 115, 174–175). In the Board's view, "[t]he entire evidence surrounding the events which followed the December 18 meeting showed that [the Company], exploiting

the emergency created by the freeze, deliberately framed a course of conduct to avoid bargaining while it inspired, encouraged, and assisted a decertification movement" (I R. 115). The Board further concluded that, since the subsequent strike had been caused by this unfair labor practice, the respondent's discharge and replacement of the 274 strikers violated Section 8(a) (3) and (1); that the eviction of some strikers from Company homes was likewise discriminatory in violation of those sections; and that respondent, by the interrogation, threats, and promises of benefit of its supervisory officials, had independently violated Section 8(a)(1) of the Act (I R. 124–129, 175–176). The Board ordered the Company to cease and desist from the unfair labor practices, to bargain with the Union upon its request, and to reinstate the strikers with back pay (I R. 177–180).

C. THE DECISION OF THE COURT BELOW

The court of appeals declined to enforce any part of the Board's order. Concluding that "the findings of the Examiner and the Board [were] dependent upon the acceptance of the testimony of Messrs. Wingate and Holly rather than the contradictory testimony of witnesses for the respondent," the court reversed the Examiner's credibility resolutions on the ground that he had proceeded on an improper basis in deciding which witnesses to believe. The court declared that "[t]he attitude and approach of the Examiner are reflected in the [following] statement made in the Intermediate Report with respect to

John Roberts, who had been the Union's chief negotiator from the time that bargaining began in April until the end of August 1957" (III R. 86–87):[5]

> Because of a circumstance which was unfortunate to his case, the General Counsel was unable to present any evidence of value supporting his position concerning the April through August negotiations. That circumstance was the fact that Roberts left the Union and went with the management of Minute Maid around the first of September. That alliance with the "opposition" not only placed Roberts in such a position which the General Counsel apparently felt would jeopardize any reliance upon him as a witness, but it developed that Roberts' relations with his former associates were such that they made no attempt after his defection to review with him either the course of his negotiations or the results which he had obtained to date. [I R. 72–73.]

In the court's opinion, the Trial Examiner, by characterizing Roberts as one who had "defected" to the "opposition," had "clearly disclose[d]" his "views as to the determining of credibility of witnesses"; *i.e.*, it could "fairly be inferred that the Examiner was of the belief that reliance may not be placed upon the testimony of a witness who is a part of the management of an employer in a controversy with a labor union" (III R. 87–88). Testing "the Examiner's

[5] Since the unlawful conduct found by the Trial Examiner and the Board occurred on and after December 18, 1957 (I R. 113–116), the court itself recognized that the events involving Roberts were irrelevant (III R. 87).

credibility findings in the light of his theory of credibility as he has declared it" (III R. 88), the court proceeded, with respect to the Christmas Day conversation (see *supra*, pp. 5–7), to reverse the Examiner, accepting Stephenson's version of the facts rather than Holly's (III R. 88–89). Similarly, with respect to the conflicts in testimony between Stephenson and Wingate (see *supra*, pp. 7–8), the court, where the Examiner had credited Wingate, credited Stephenson (III R. 89–90).

The court concluded that there was no basis for the Board's finding that respondent had refused to bargain in good faith; that the strike was thus an economic rather than an unfair labor practice strike; and that the 274 replaced strikers were accordingly not entitled to reinstatement (III R. 90). Turning next to the Board's findings of an independent violation of Section 8(a)(1) of the Act, the court rejected them on various grounds. It concluded that the Company's permitting of the solicitation of January 22 to February 7 "does not seem to be an unfair labor practice" (III R. 91); that respondent's threats and promises of benefit to the strikers did not violate the Act since "it was not an act of interference for representatives of the respondent to inform the strikers that it would or might do that which it had a right to do and subsequently did so" (III R. 90); and that respondent's further threats and acts of interference were "not enough, either taken separately or in conjunction with other events, to form the basis for an unfair labor practice charge" (III R. 93).

SUMMARY OF ARGUMENT

It is well established that a resolution of credibility by the trier of fact, who alone has the real opportunity of appraising the witnesses, must be accepted by a reviewing court "unless on its face it is hopelessly incredible * * * or flatly contradicts either a so-called 'law of nature' or undisputed documentary testimony." *National Labor Relations Board* v. *Dinion Coil Co.*, 201 F. 2d 484, 490 (C.A. 2). Moreover, bias or partiality may not be attributed to a trier of fact merely because he has ruled uniformly for Board witnesses and against company witnesses, "[u]nless the credited evidence * * * carries its own death wound * * * and the discredited evidence * * * carries its own irrefutable truth." *National Labor Relations Board* v. *Robbins Tire & Rubber Co.*, 161 F. 2d 798, 800 (C.A. 5).

I

The action of the court below in setting aside the major portion of the Board's order is contrary to the settled principles governing the resolution of credibility. The key question in the present case is whether the break-off of negotiations on December 18, 1957, and the Company's subsequent reluctance to resume meeting with the Union, were engendered by its effort to assess the impact of the citrus freeze on its operations or by a desire to stall until February 6, 1958, when the Company would be free to contest the Union's right to represent the employees. As the court below acknowledged, the answer to this question

turns primarily upon whether the testimony of Production Manager Stephenson or the contrary testimony of employee Holly and Union agent Wingate is accepted. The Trial Examiner, whose resolution of this issue was affirmed by the Board, believed Holly and Wingate and disbelieved Stephenson. The Examiner's determination was based upon his observation of the demeanor of the respective witnesses, and upon other reasonable considerations which he detailed in his Intermediate Report. The court below, without specifically rejecting any of the considerations set forth by the Examiner, invalidated his determinations of credibility on the ground that he had applied a biased test in making them. The court's conclusions do not withstand analysis, being based, in large part, on a misreading or distortion of certain statements made by the Examiner in his Report, which were unrelated to the events immediately at issue. The court's action in setting aside the Examiner's findings was thus unwarranted and constituted an abuse of its reviewing function under Section 10(e) of the Act.

II

The court further erred in declining to sustain the Board's findings that respondent had engaged in independent violations of Section 8(a)(1) of the Act. The conduct in question constitutes a clear violation of the section. The reasons advanced by the court do not justify a contrary conclusion.

ARGUMENT

INTRODUCTION

In our petition for certiorari in this case, and in the petition for certiorari and the brief on the merits in the related case, *National Labor Relations Board* v. *Walton*, No. 77, this Term, we pointed out that the court below has frequently applied improper principles in reviewing Board orders, in reviewing the facts *de novo* and in substituting its judgment for that of the Board even though, on the record considered as a whole, the Board's findings were supported by substantial evidence. The *Walton* case involved a situation in which the evidence was susceptible of conflicting inferences, and the court upset the inferences drawn by the Board even though they were well warranted. In the present case, the court has made an even more basic incursion into the Board's fact-finding function, by setting aside a Board Trial Examiner's resolutions of credibility which were not plainly unreasonable.

The demeanor of a witness is an important element in determining whether his version of an incident is to be believed. Every court of appeals, including the court below, has recognized the "superior opportunity of the Examiner to observe the demeanor of the witnesses." *Motorola, Inc.* v. *National Labor Relations Board*, 199 F. 2d 82, 83 (C.A. 9), certiorari denied, 344 U.S. 913.[6] Accordingly, as Judge Frank

[6] See, *e.g.*, *National Labor Relations Board* v. *Lunder Shoe Corp.*, 211 F. 2d 284, 288 (C.A. 1), and cases cited; *National Labor Relations Board* v. *Jarka Corp.*, 198 F. 2d 618, 620

observed, the reviewing court "may not upset * * * the Examiner's evaluation of oral testimony * * * unless on its face it is hopelessly incredible * * * or flatly contradicts either a so-called 'law of nature' or undisputed documentary testimony." *National Labor Relations Board* v. *Dinion Coil Co.*, 201 F. 2d 484, 490 (C.A. 2). Any other rule "overlooks the significance of the carriage, behavior, bearing, manner and appearance of a witness—his demeanor—when his testimony is given orally in the presence of the trier of facts." *National Labor Relations Board* v. *Howell*

(C.A. 3); *Eastern Coal Corp.* v. *National Labor Relations Board*, 176 F. 2d 131, 133 (C.A. 4); *National Labor Relations Board* v. *Rock Hill Printing & Finishing Co.*, 131 F. 2d 171 (C.A. 4); *National Labor Relations Board* v. *American Thread Co.*, 204 F. 2d 169, 171 (C.A. 5); *National Labor Relations Board* v. *Truck Drivers & Helpers Local Union No. 728*, 228 F. 2d 791, 796–797 (C.A. 5); *United Fireworks Mfg. Co.* v. *National Labor Relations Board*, 252 F. 2d 428, 430 (C.A. 6); *National Labor Relations Board* v. *Ridge Tool Co.*, 151 F. 2d 947, 948 (C.A. 6); *Sunshine Biscuits, Inc.* v. *National Labor Relations Board*, 274 F. 2d 738, 741 (C.A. 7); *National Labor Relations Board* v. *Die & Tool Makers Lodge No. 113*, 231 F. 2d 298, 302 (C.A. 7), certiorari denied, 352 U.S. 833; *National Labor Relations Board* v. *Fisher Governor Co.*, 163 F. 2d 913, 914 (C.A. 8); *Paramount Cap Mfg. Co.* v. *National Labor Relations Board*, 260 F. 2d 109, 113 (C.A. 8); *National Labor Relations Board* v. *Scott & Scott*, 245 F. 2d 926, 929 (C.A. 9); *National Labor Relations Board* v. *Sun Co. of San Bern.*, 215 F. 2d 379, 381 (C.A. 9); *National Labor Relations Board* v. *Wemyss*, 212 F. 2d 465, 469 (C.A. 9); *National Labor Relations Board* v. *Tri-State Casualty Ins. Co.*, 188 F. 2d 50, 53 (C.A. 10); *National Labor Relations Board* v. *Oklahoma City Gen. Driv. Local 886*, 235 F. 2d 105, 107 (C.A. 10), and cases cited; *News Printing Co.* v. *National Labor Relations Board*, 231 F. 2d 767, 770 (C.A.D.C.); *Victor Products Corp.* v. *National Labor Relations Board*, 208 F. 2d 834, 838 (C.A.D.C.). See, also, *Dyer* v. *MacDougall*, 201 F. 2d 265, 269 (C.A. 2).

Chevrolet Co., 204 F. 2d 79, 86 (C.A. 9), affirmed, 346 U.S. 482.

Furthermore, no doubt should be cast upon the agency's resolution of issues of credibility by the fact that an Examiner may uniformly credit the Board's witnesses and equally uniformly reject the company's witnesses. In the often quoted[1] words of Judge Hutcheson in *National Labor Relations Board* v. *Robbins Tire & Rubber Co.*, 161 F. 2d 798, 800 (C.A. 5):

> The fact alone * * * of which Respondent makes so much, that Examiner and Board uniformly credited the Board's witnesses and as uniformly discredited those of the Respondent, though the Board's witnesses were few and the Respondent's witnesses were many, would not furnish a basis for a finding by us that such a bias or partiality existed and therefore the hearings were unfair. Unless the credited evidence * * * carries its own death wound, that is, is incredible and therefore, cannot in law be credited, and the discredited evidence * * * carries its own irrefutable truth, that is, is of such nature that it cannot in law be discredited, we cannot determine that to credit the one and discredit the other is an evidence of bias.

In applying these principles, "it will not do for courts to give lip-service to the 'expertise' of an administrative agency, and then scrutinize with a captious eye and weigh with an apothecary's scale every finding made by such an agency." *Foreman & Clark, Inc.* v. *National Labor Relations Board*, 215 F. 2d 396, 398 (C.A. 9), certiorari denied, 348 U.S. 887. But in

[1] See *National Labor Relations Board* v. *Pittsburgh S.S. Co.*, 337 U.S. 656, 659–660; *National Labor Relations Board* v. *Poultry Enterprises*, 207 F. 2d 522, 524 (C.A. 5).

the present case, the court below attempted to justify its weighing the Examiner's resolutions of credibility with an "apothecary's scale" by suggesting, in effect, that the Examiner was biased from the outset and that this bias tainted his findings. Not only did the court erroneously conclude that the Examiner applied a biased test in arriving at his credibility resolutions, but the court further erred by overlooking or unduly minimizing certain other conduct of the respondent which amounted to additional and independent violations of the Act.

I

THE COURT BELOW ERRED IN REJECTING THE TRIAL EXAMINER'S CAREFULLY DOCUMENTED RESOLUTIONS OF CREDIBILITY

The key question in this case is whether the breakoff of negotiations on December 18, 1957,[8] and the Company's subsequent reluctance to resume meeting with the Union, were engendered by its desire to assess the impact of the citrus freeze on its operations or by a decision to stall until February 6, 1958, when the Company would be free to contest the Union's right to represent the employees. As the court below itself acknowledged (III R. 86), the answer to this question turns primarily upon whether the Board should have accepted the testimony of Stephenson or the contrary testimony of Holly and Wingate.

1. Holly—whom the Trial Examiner and the Board believed, and whose testimony was borne out

[8] The Board found a refusal to bargain in good faith only on and after December 18, 1957 (I R. 113–116).

by the subsequent events—testified (see the Statement, *supra,* pp. 5–6) that, on Christmas Day, Production Manager Stephenson told him that the Company did not intend to sign a contract with the Union; that it was just waiting for February 6 when it could formally terminate negotiations; that it would help the employees initiate decertification proceedings; and that the employees would get wage increases as soon as the Union was eliminated. Wingate, who was also credited by the Examiner and the Board, testified (see the Statement, *supra,* p. 7) that, when he asked Stephenson why the Company, on January 4, 1958, had offered a wage increase without a contract proposal, Stephenson replied that the offer had "intentionally" been made that way because the Company had no contract proposal for the Union.

The Trial Examiner accepted Holly's version of his Christmas Day conversation with Stephenson because, in view of Holly's past position and present attitude toward the Union, it was likely that he would be singled out to lead a defection movement; because the events he forecasted in fact transpired; and because "Holly was an impressive witness both on direct and on cross-examination, while Stephenson, in comparison, sometimes reflected on cross-examination a demeanor and manner of reluctance in testifying which prevented acceptance of his testimony at face value" (see the Statement, *supra,* p. 7). Similarly, the Examiner accepted Wingate's version of his January conversation with Stephenson because Stephenson had conceded that

the wage offer was "intentionally" made without a contract proposal, and his explanation why this procedure was followed—*i.e.*, that the Company already had a contract proposal before the Union—was contrary to the facts; whereas Wingate's account—*i.e.*, that there was no contract proposal because the Company did not intend to make one to the Union—was consistent with the plan of undermining employee support for the Union, with respect to which Holly had previously testified (see the Statement, *supra*, pp. 7–8). These reasons for crediting the testimony of Holly and Wingate are rational; their testimony was not inherently improbable; and, in view of the Examiner's opportunity to take into account the demeanor of the witnesses, his resolution of the issue of credibility was well within the range of his authority. Under the principles governing the determination of credibility (see *supra*, pp. 19–21), the Examiner's acceptance of the Holly-Wingate testimony was entitled to stand.

2. Instead of following these principles, the court below seized upon a minor statement by the Examiner in his Intermediate Report, misconstrued it, and then used it as a basis for overturning his findings.

(*a*) The court set aside the Examiner's determination that the testimony of Holly and Wingate was credible, and made diametrically opposite findings, not because it found their testimony inherently improbable, but because it ascribed to the Examiner a predisposition to disbelieve all managerial witnesses. Cf. *National Labor Relations Board* v. *Pittsburgh*

S.S. Co., 337 U.S. 656. The predisposition was allegedly revealed in the Examiner's words explaining why a certain witness—whose testimony would in any event have been irrelevant to the events forming the basis for the Board's unfair labor practice findings (n. 5, *supra*, p. 15)—was not called. The Examiner stated that Roberts, the Union's former chief negotiator (see the Statement, *supra*, p. 3) had left its employ and became allied with the management of another firm in the same industry. He added that this alliance with the "opposition"[9] placed Roberts in such a position that the General Counsel apparently felt it would jeopardize any reliance upon him as a witness, and "Roberts' relations with his former associates were such that they made no attempt after his defection to review with him either the course of his negotiations or the results which he had obtained to date" (I R. 73). Picking out the words "opposition" and "defection," the court concluded that it is "[t]he *expressed* view of the Examiner that where a person has defected from a union and formed an alliance with the 'opposition,' that is to say, with an employer of labor, such person would be unable to give any 'evidence of value,' and that such 'alliance' would 'jeopardize any reliance upon him as a witness'" (III R. 88, emphasis added). Accordingly, and without referring to the Examiner's express reliance on the demeanor of Holly, the court set aside the Examiner's determinations on credibility and, in turn, the Board's order.

[9] Quotation marks supplied by the Examiner (see I R. 72).

A fair reading of the Trial Examiner's statement with respect to Roberts does not warrant the court's interpretation. The Examiner was not characterizing Roberts as being in opposition to anyone but his former associates, as he was in fact. Nor was the Examiner saying that *he* would not have credited Roberts, but merely that the General Counsel feared Roberts would be hostile to his case and therefore did not call him. Finally, the Examiner's reference to Roberts' "defection" does not imply that Roberts deserved obloquy for having "deserted his cause" (III R. 87), but only that he appeared to "his former associates" as one who had deserted them.[10]

(*b*) Nor is the court's action justified by the other circumstances which it cited as militating against the Examiner's findings on credibilty. Thus, the court

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[10] The statement in the Examiner's report apparently stemmed from the following colloquy between the Examiner and counsel for the General Counsel with reference to calling Roberts as a witness (pp. 1219–1220 of the original transcript of testimony, which has been filed with the Court):

TX: Of course, he is obviously in the territory.

GC: Yes sir, he is a labor relations director for Minute Maid.

TX: I understand that. The record shows that already.

GC: Yes sir.

TX: The Respondent could have called him.

GC: I submit they didn't call him.

TX: Either side could have called him so apparently—Well, of course, he was your negotiator at the time.

GC: Yes sir, but he has jumped on the other side of the fence.

TX: I understand, but that doesn't necessarily affect the force of an oath, does it?

GC: Sometimes I wonder. I will be glad to continue my legal theory if you like.

expressed incredulity over the fact that in the Christmas Day conversation "respondent's production manager would disclose its labor program and its plans for carrying out such program to a plant watchman" (III R. 89). As the Examiner pointed out (I R. 90, 94–95), however, Holly "had been employed by Respondent some 13 years, had served as chief shop steward for the old AFL union since 1948, and had also acted as its representative in certain arbitration matters." This experience, plus "his criticism of [the incumbent Union, the Teamsters], its representatives, and the negotiations obviously marked him as promising material to lead a defection movement."

(*c*) On no firmer footing is the court's conclusion (III R. 89–90) that Wingate's testimony was that "of a careless and inept witness whose recollection of some matters cannot be accepted and whose statements are doubted with respect to issues which are not crucial." At one point in his report, the Examiner had described Wingate's handling of a minor part of the negotiations in October as reflecting "only ineptness or carelessness" (I R. 77). This statement was not intended as a characterization of Wingate's credibility as a witness; nor would it have had much bearing on a conversation with Stephenson occurring three months later. To use this earlier incident as the basis for rejecting Wingate's later testimony is to ignore the circumstances, again carefully described by the Examiner (I R. 88–89, 97–99, 103–104), which corrobate Wingate's version of the January conversation with Stephenson. Although the court purported

not to require the Examiner "to apply the maxim, *Falsus in uno, falsus in omnibus*" (III R. 89), it applied that very maxim itself in rejecting Wingate's testimony and accepting Stephenson's.

3. The action of the court below in substituting its judgment respecting the credibility of witnesses for that of the Trial Examiner and the Board involved an abuse of its reviewing powers under the Act and was contrary to the uniform decisions of the courts of appeals on this subject (see *supra*, pp. 19–20). The court below ignored the early admonition of this Court, which was not altered by the *Universal Camera* decision, that the Board "has the function of appraising conflicting and circumstantial evidence, and the weight and credibility of testimony." *National Labor Relations Board* v. *Link-Belt Co.*, 311 U.S. 584, 597. Had the court heeded this admonition and permitted the Examiner's determinations of credibility to stand, it would have found ample evidence to support the Board's findings that the breakoff of negotiations on December 18, 1958, and the subsequent failure to reach an agreement with the Union was part of a plan to stall negotiations and undermine employee support for the Union, so that by February 6, 1958, when the Union's representative status could be questioned before the Board, the Union would be repudiated;[11]

[11] Even if, contrary to the foregoing, the December 18 meeting be not deemed the beginning of the respondent's refusal to bargain, there was certainly such a refusal at the end of the January 28 meeting. Thus, Union representatives Wingate and Morgan, whose testimony was credited by the Examiner and not contradicted by respondent's witnesses (I R. 105; II R. 226, 342), asserted that the January 28 meeting ended with the un-

and that therefore the respondent failed to bargain in good faith with the Union on and after December 18.

II

THE COURT BELOW FURTHER ERRED IN DECLINING TO SUSTAIN THE BOARD'S FINDINGS THAT RESPONDENT HAD ENGAGED IN INDEPENDENT VIOLATIONS OF SECTION 8(a)(1) OF THE ACT

1. The Board found, on the basis of Stephenson's testimony (II R. 471–472), that the Company's practices "*had not been * * * to permit the union to solicit other employees for union membership during working hours*" (emphasis supplied by the Examiner, I R. 107). The Board further found that, despite this practice of forbidding solicitation of "*union member-*

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derstanding that the Union would have to wait until the Company specified a future meeting date; the Company never contacted the Union. The court attempted to brush this fact aside on the ground (III R. 85) that the "testimony is not sufficiently explicit to sustain a refusal to bargain charge for failure of the respondent to contact the union for a resumption of bargaining." But, to so conclude, the court either had to ignore credited and uncontradicted testimony, or reweigh it; neither of these actions is permissible.

If the refusal to bargain dates from December 18, it is readily apparent that the strike, which occurred on January 14, could be viewed (as did the Board) as caused by that unfair labor practice, with the result that the strikers would be entitled to their jobs back even though they may have been replaced. The strikers would still have that right even if the refusal to bargain did not occur until January 28, for a strike which is economic at its inception may, by subsequent unfair labor practices, be converted into an unfair labor practice strike. See *Masiro Plastic Corp.* v. *National Labor Relations Board*, 350 U.S. 270, 278; *National Labor Relations Board* v. *Giustina Bros. Lumber Co.*, 253 F. 2d 371 (C.A. 9).

ship during working time, [the respondent] openly permitted, encouraged, and assisted the solicitation of *defections,* not only during the working time of the employees themselves, but during that of the solicitors" (emphasis supplied by the Examiner, I R. 112). The Board concluded (I R. 130–131) that this conduct violated Section 8(a)(1) of the Act.

The court rejected the Board's conclusion because (III R. 91) "[p]ermitting the soliciting during working hours of employee signatures on petitions for the withdrawal of union recognition does not seem to be an unfair labor practice." But clearly a company which forbids pro-union solicitation violates the Act if it permits anti-union solicitation. As the court below has observed on another occasion, "An otherwise valid no-solicitation rule * * * cannot be invoked or applied for a discriminatory anti-union purpose." *National Labor Relations Board* v. *Avondale Mills,* 242 F. 2d 669, 671 (C.A. 5), affirmed *sub nom. National Labor Relations Board* v. *Steelworkers,* 357 U.S. 357. See also *LeTourneau Co. of Georgia* v. *National Labor Relations Board,* 143 F. 2d 67, 68 (C.A. 5), reversed on other grounds, 324 U.S. 793.

Moreover, there was evidence that respondent assisted and actively encouraged the circulation of the petitions (see the Statement, *supra,* pp. 12–13). This evidence, which the court overlooked, would itself have been sufficient to support the Board's finding that respondent's conduct in respect to the petitions violated Section 8(a)(1) of the Act.

2. The court below also declined to sustain the Board's findings that respondent's innumerable

threats and promises of benefit (see the Statement, *supra*, pp. 8–9, 10–11) violated Section 8(a)(1) of the Act. The court stated that, "[s]ince [the strike] was not [an unfair labor practice strike] and since the respondent had the right to replace and discharge those on strike, it was not an act of interference for representatives of the respondent to inform the strikers that [the Company] would or might do that which it had a right to do" (III R. 90). But the conversations of respondent's foremen with the employees "necessarily involved more than * * * mere statement[s] of intent to lawfully replace economic strikers." *National Labor Relations Board* v. *Giustina Bros. Lumber Co.*, 253 F. 2d 371, 373 (C.A. 9).

The court further stated (III R. 93) that the "other statements attributed to foreman and other lower strata supervisory personnel are not to be condoned but are not enough, either taken separately or in conjunction with other events, to form the basis for an unfair labor practice charge." Seeking to buttress this conclusion, the court pointed out that the Examiner had characterized these events as "minor ones involving a miscellany of alleged interference, restraint, and coercion." Although the Examiner did characterize as "minor" these events—which are classic forms of restraint and coercion, in violation of Section 8(a)(1) of the Act—he did so only "in comparison" (I R. 70) with his other findings and conclusions, which involved even more flagrant anti-union conduct. In any event, the judgment whether conduct—otherwise violative of the Act—is important

enough to warrant issuance of a remedial order should be made by the Board and not the court. It "is for the Board, not the courts, to determine how the effect of * * * unfair labor practices may be expunged." *I.A.M.* v. *National Labor Relations Board,* 311 U.S. 72, 82; *Franks Bros. Co.* v. *National Labor Relations Board,* 321 U.S. 702, 704.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be reversed and the case should be remanded to that court with directions to enter a decree enforcing the Board's order.

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APPENDIX

The relevant provisions of the National Labor Relations Act (61 Stat. 136, 29 U.S.C. 151, *et seq.*), in addition to those set forth in the Appendix to our brief in No. 77, this Term, are as follows:

> SEC. 8. (a) It shall be an unfair labor practice for an employer—
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> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subt to the provisions of section 9(a).
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> * * * * *
>
> (d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—
>
> (1) serves a written notice upon the other party to the contract of the proposed

termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a

strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

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